

¹ In the award calculation set out in the Award Nunc Pro Tunc, the impairment was set out as being a 27 percent "work disability" rather than functional disability, which the parties agree is a typographical error. There was no claim for work disability. Therefore, the SALJ's award of permanent partial disability compensation is an award based upon claimant's percentage of functional impairment as opposed to being the average of his wage loss and task loss percentages.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent concedes claimant's bilateral carpal tunnel syndrome arose out of and in the course of her employment. However, respondent contends that claimant's cervical condition did not arise out of and in the course of her employment. If the Board finds the cervical condition was caused or aggravated by her work activities, respondent argues those activities are normal activities of daily living.

Claimant asserts that she met her burden of proving that her cervical injury arose out of and in the course of her employment with respondent. She asks that the Board affirm the finding of the SALJ that her cervical injury was work related but modify the award to award her permanent partial disability compensation for a 34 percent permanent impairment of function in accordance with the testimony of Dr. Prostic.

The issues for the Board's review are:

- (1) Did claimant's cervical injury arise out of and in the course of her employment with respondent?
- (2) If so, is the disability that resulted from claimant's cervical condition the result of a normal activity of daily living?
- (3) What is the nature and extent of claimant's injury?

FINDINGS OF FACT

Claimant has worked for respondent, a credit card service company, since November 2006. Her job consisted of speaking on the telephone with customers and clients. She dealt with 14 different types of cards, each with its own protocol. She handled about 20 calls per hour. She worked 8 hours per day, 40 hours per week. In doing her job, she would be typing, rotating her neck, twisting, and reaching overhead.

Claimant works in a 4 foot by 5 foot cubicle, and she hung information on each of her 14 clients on the walls of the cubicle. The information would be on 8 x 11 sheets of paper and would be pinned on the walls at about shoulder level. As calls came in, claimant would have to move in her chair, twist her body, raise her head and reach overhead to take papers off or replace them on the wall. In some instances, she would have to rotate approximately 180 degrees. Claimant testified this caused her to have pain in her neck and arms, as well as headaches. She had tingling in her hands and arms. The problems would be less severe at the first of the week but would worsen by the end of the week. Claimant acknowledged that she rotated and moved her head while driving and that in her

normal activities of daily living she would look around with her head, move it side to side and up and down. However, she said those types of movements, including overhead work and reaching, were more intensive at work than at home.

Claimant reported her physical problems to respondent and was sent to Contra, where she was prescribed steroid treatment and physical therapy. She was eventually referred to Dr. Keith Hodge, who performed carpal tunnel release surgeries, first on her left and later on her right. After the surgeries, claimant again had physical therapy. However, claimant was still having problems with her hands, and said that when she went back to work, her symptoms increased dramatically. Claimant said she continues to have symptoms in her hands that are the same symptoms she had before her carpal tunnel release surgeries. Her hands get numb and she drops things. She has severe headaches and neck pain, which she contends are also work-related.

Claimant was referred to Dr. Geoffrey Blatt for treatment of her cervical condition, and he performed surgery on her cervical spine. She states that now when she walks on hard surfaces, she gets an electric-like shock that goes down her arms into her hands. She cannot raise her arms as high as before, and washing her hair makes her arms go numb.

Dr. Blatt, who is a board certified neurosurgeon, initially examined claimant on October 10, 2008, as a referral from Dr. Keith Hodge. At that time, claimant was complaining of bilateral arm and hand pain, as well as numbness and some neck discomfort. She had previously undergone bilateral carpal tunnel release surgeries.

As part of Dr. Blatt's evaluation, he reviewed an MRI of claimant's cervical spine that showed she had disc herniations at C5-6 and C6-7 with moderate severe spinal stenosis. Claimant had a congenitally small spinal canal in the cervical region. Dr. Blatt spoke to claimant about possible injections in her neck, but he told her he thought eventually she would need surgery.

Dr. Blatt tried conservative treatment, but claimant continued to have problems. On March 31, 2009, he performed a two-level C5-6 and C6-7 anterior cervical discectomy and fusion with donor bone graft and anterior instrumentation. On May 20, 2009, claimant was released by Dr. Blatt to return to work half days, and then to progress to full duty. On August 12, 2009, he concluded that she was at maximum medical improvement and released her from treatment to return if needed.

Dr. Blatt said he told claimant he did not think this was a work-related injury. It was Dr. Blatt's opinion there was nothing in her history that suggested a work-related injury to her neck. He said she clearly had congenital spinal stenosis that was predetermined by her genetics, not by any work. Dr. Blatt reviewed claimant's testimony at the preliminary hearing held November 20, 2008, after which he testified he had not changed his opinion that claimant's job duties did not cause the cervical spine abnormalities he treated. He

said claimant's problem was congenital spinal stenosis. In addition to that problem, she had disc herniations which caused compression because of the narrow canal. The disc herniations, however, were not something she was born with. He testified:

Q. [by claimant's attorney] If a person repetitiously moved their head either up and down or side-to-side, would those kind of movements away from neutral, would those add to the stress on the spinal cord?

A. [by Dr. Blatt]: If we're talking about repetitive motion concepts, clearly arthritic changes: Disc bulges, degenerative changes that thicken the ligamentum flavum are all the result of movement through life.

Q. Okay.

A. I guess my concern with that is that most people shake their head up and down when they say "yes," or when they respond, it's just part of our normal movements, and it's very hard for me to attribute that—in the circumstances of a neck—attribute a repetitive motion event to work because I think that people develop it whether they're working or not.²

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on multiple occasions, each time at the request of claimant's attorney. He first saw claimant on November 12, 2008, at which time she told him she had developed progressive numbness, tingling and pain in her hands and a sharp pain in her left elbow. She underwent left and right carpal tunnel release in April and May 2008 respectively. Her surgeon, Dr. Hodge, suspected claimant's cervical spine was a source of ongoing problems. X-rays and an MRI showed that claimant had degenerative disc disease at C5 to C7 with left-sided spinal stenosis and cord compression. She was seen by Dr. Blatt, who recommended a two-level discectomy and fusion. Claimant denied any preexisting musculoskeletal impairment. She told Dr. Prostic she continued to have an ache in her neck, head, upper back, and arms that worsened with ordinary activity.

After examining claimant, taking her history, and taking and reviewing x-rays, Dr. Prostic opined that during the course of her employment at respondent claimant sustained repetitious minor trauma. He recommended epidural steroid injections, subacromial steroid injections and strengthening exercises for her shoulder. He believed that claimant also needed treatment for her cervical spinal stenosis and for rotator cuff disease.

Claimant returned to Dr. Prostic on July 24, 2009, for a re-evaluation of her work injury. Claimant had been operated on by Dr. Blatt on March 31, 2009, for anterior cervical discectomy and fusion C5 to C7. She had some post-operative improvement. However, she was having shocks that intermittently went down both arms to her fingers. This occurred predominantly when walking. Claimant also told him she had difficulty flexing and extending her neck and that she had weakness in both hands. In examining claimant, Dr. Prostic found that she tested positive for thoracic outlet syndrome bilaterally. After

² Blatt Depo. at 13-14.

examining claimant, Dr. Prostin found she still had significant symptoms that might be from cervical myelopathy and/or from thoracic outlet syndrome. He recommended she be treated further with shoulder shrug exercises for thoracic outlet syndrome.

Dr. Prostin next saw claimant on December 1, 2009. Since her last examination with Dr. Prostin, she had undergone an EMG that showed evidence of mild to moderate right, and mild left carpal tunnel syndrome and bilateral C6-7 radiculitis. Claimant told Dr. Prostin she continued to have pain in both hands and wrists that worsened with activity, and she dropped things unexpectedly. She also said she sometimes had sharp pains going down her upper back when looking upward. After examining claimant, Dr. Prostin opined that claimant was having a worsening of cervical myelopathy and should have epidural steroid injections. Again, he recommended she do shoulder shrug exercises.

Using the *AMA Guides*,³ Dr. Prostin found that claimant had a three-level cervical myelopathy which placed her in the equivalent of DRE cervical Category IV, a multiple level neurological involvement of the cervical spine, for a 25 percent impairment. He found she had an additional 10 percent impairment to each upper extremity for carpal tunnel syndrome. Converting the upper extremity impairment ratings to body as a whole ratings and combining them with the 25 percent body as a whole impairment rating for claimant's cervical spine gave her a total 34 percent impairment rating to the body as a whole.

Dr. Prostin said that claimant has cervical stenosis, which he described as inadequate space for the spinal cord in the cervical spine. He said that the more claimant moves her head away from neutral position, either up or down or to either side, the more she decreases the space for the cervical spinal canal, allowing for permanent aggravation of her condition. Dr. Prostin said that in his opinion, the work claimant performed at respondent was sufficient to cause permanent aggravation of this condition. He also said this would be true whether a person moved the neck away from neutral at work or in their normal life.

Dr. Chris Fevurly is board certified in internal medicine and occupational medicine and is also a certified independent medical examiner. He evaluated claimant on May 5, 2010, at the request of respondent. He reviewed claimant's testimony at the preliminary hearing and regular hearing, as well as her medical records. He took a history regarding her work activities and her medical history. He also performed a physical examination.

Dr. Fevurly diagnosed claimant with congenital cervical stenosis. He thought she had some cord compression but did not think she had myelopathy, which he described as a permanent malfunction of the neurological pathways in the cervical cord. He said claimant did not meet the criteria for radiculopathy, but he believed the symptoms in her upper extremities were consistent with radiculitis. Dr. Fevurly also stated:

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

. . . I do think she had spinal stenosis or narrowing in the central canal. I think that she had degenerative changes leading to that with the degenerative disk disease and bony spondylosis that existed there. And that, in addition to what was a congenitally small canal, produced clinical cervical stenosis.⁴

Dr. Fevurly opined that the cause of claimant's cervical stenosis is a congenitally small cervical canal with narrowing of that canal over time by the natural process of degenerative changes in the disk. Then the resulting bony hypertrophy occurred, leading to further cervical canal narrowing. He said the narrowing could impinge on the cord to produce so-called cord compression-type symptoms or injure the cord and produce myelopathy and/or nerve root entrapment that may cause myelopathy. But he stated that claimant's activities at work did not cause this.

Q. [By respondent's attorney] Is it correct that an individual in the normal course of living, performing their ordinary daily activities, would move their head away from the neutral position?

A. [By Dr. Fevurly] We all do that every day, hundreds of times a day.

Q. And that would essentially be any time your head is moved away from direct center?

A. Once again, people turn their heads all day long. I think we all do that. Some—the younger we are, the more range of motion we have. The older we are, the less range of motion we have. And that's due to the changes that occur over time in the anatomy of the spine. But we all develop these degenerative changes, and we all turn our heads throughout our lifetime.⁵

As far as the impairment to claimant's cervical spine, Dr. Fevurly noted that claimant had mostly symptoms without objective motor weakness or permanent sensory loss in either a nerve root distribution or from the cord. Claimant underwent an instrumented fusion but had no vertebral segmental instability, which is required to move her into Category IV or V of the cervicothoracic DRE categories. However, giving her the benefit of a doubt, he rated her as having a Category III cervicothoracic DRE impairment, which accords her a 15 percent whole person impairment for her cervical stenosis.

Dr. Fevurly also diagnosed claimant with moderately severe median nerve entrapment on the left and moderate on the right, which were consistent with bilateral carpal tunnel syndrome. Dr. Fevurly testified it was difficult to come to a conclusion in regard to claimant's impairment as it related to her bilateral carpal tunnel syndrome

⁴ Fevurly Depo. at 20.

⁵ Fevurly Depo. at 24-25.

because of the nonphysiologic nature of her examination.⁶ But due to claimant's ongoing complaints in her hand, he used Chapter 15 of the *AMA Guides* and found she had a 5 percent bilateral upper extremity impairment from her carpal tunnel syndrome. He added that in reality, he thought there was a good chance claimant had no impairment.

Dr. Fevurly did not believe that claimant is in need of permanent work restrictions. He believed she had a successful decompression of both her median nerves and a successful decompression of her cervical cord.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁷ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁸

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

⁶ Dr. Fevurly found that the results of claimant's grip strength test "flies in the face of what she can do." Depo. at 12. He also said that in testing her weakness, she had give-way weakness in multiple muscle groups of the upper extremities, and that if a person has true muscular weakness, she will have weakness throughout all the testing. Further, during the two-point discrimination test, claimant was "incredibly inconsistent," and he did not know how to interpret the results. Depo. at 18.

⁷ K.S.A. 2009 Supp. 44-501(a).

⁸ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁹

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹⁰ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹¹ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹²

K.S.A. 2009 Supp. 44-508(e) defines "personal injury" and "injury":

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The Kansas Supreme Court, in *Boeckmann*,¹³ denied workers compensation benefits, holding that

physical disability resulting from a degenerative arthritic condition of the hips which progressed over a period of years while the workman was employed is not compensable as an accident arising out of and in the course of his employment under the circumstances found to exist in the instant case.

Among the circumstances the court found to exist was that Mr. Boeckmann's disabling arthritis existed before his employment with Goodyear and that "the degenerative process will continue to progress long after his retirement."¹⁴ The medical testimony was

⁹ *Id.* at 278.

¹⁰ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹¹ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹² *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

¹³ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, Syl., 504 P.2d 625 (1972).

¹⁴ *Id.* at 736.

that Mr. Boeckmann's hip problems, or the disabilities arising therefrom, were [not] caused by his work at the Goodyear plant; that his employment did not cause his condition to occur; that the hip condition had been a progressive process; that increased activity was liable to aggravate the claimant's underlying problem but that almost any everyday activity has a tendency to aggravate the problem; that every time the claimant bent over to tie his shoes, or walked to the grocery store, or got up to adjust his TV set there would be a kind of aggravation of his condition. . . .

. . . The examiner found, on what we deem sufficient evidence, that any movement would aggravate Boeckmann's painful condition and there was no difference between stoops and bends on the job or off.¹⁵

Similarly, in *Martin*,¹⁶ the Kansas Court of Appeals held that "[i]njuries resulting from risk personal to an employee do not arise out of his employment and are not compensable."

More recently, the Kansas Court of Appeals in *Johnson*¹⁷ held:

In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"¹⁸

In *Anderson*,¹⁹ the Kansas Court of Appeals held claimant's repetitive trauma injury compensable even though the offending activity was also performed apart from the employment because the employment required claimant to perform the activity more frequently than what claimant would do away from work.

¹⁵ *Id.* at 738-39.

¹⁶ *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, Syl. ¶ 3, 615 P.2d 168 (1980).

¹⁷ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3, 147 P.3d 1091, rev. denied 281 Kan. __ (2006).

¹⁸ *Id.* at 788.

¹⁹ *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

The Kansas Supreme Court has held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.²⁰

ANALYSIS

That claimant's bilateral carpal tunnel syndrome is work related is not in dispute. What is in dispute is whether claimant's neck injury was caused by her employment.

Claimant developed symptoms of cervical radiculopathy while working for respondent. In her job with respondent, claimant performed frequent movements of her head, neck, shoulders, arms and hands. Her symptoms worsened as her work week progressed. Although claimant performed similar movements away from work, the frequency was not as great as when she was working. Neither Dr. Fevurly nor claimant's treating neurosurgeon, Dr. Blatt, related claimant's condition to her employment, in part because claimant's cervical spine was congenitally narrow. The herniated discs in claimant's neck, for which Dr. Blatt performed surgery, were not congenital. But the congenital condition may have contributed to claimant's need for surgery due to the herniations impinging within the abnormally narrow spinal canal. Both Dr. Fevurly and Dr. Blatt acknowledged, however, that repetitive movement of the head would increase, aggravate and accelerate the type of degenerative changes that led to claimant's need for surgery. The changes occur whether working or not, but to the extent claimant performed these activities in greater frequency at work, the work increased the risk of injury. In this regard, Dr. Prostic reasoned that claimant's work permanently aggravated claimant's condition. Based upon claimant's testimony comparing her work activities to her activities of daily living, the Board concludes that like the claimant in *Anderson*, the greater frequency of movements at work distinguish this claim from one where the injury is due to an activity of day-to-day living.

As for the nature and extent of claimant's impairments, the Board finds the rating opinions of Dr. Prostic to be the most persuasive. As such, claimant is entitled to an award of permanent partial disability compensation based upon a combined 34 percent impairment to the body as a whole.

CONCLUSION

(1) Claimant's cervical injury arose out of and in the course of her employment with respondent.

(2) Claimant's disability is not the result of the normal activities of day-to-day living.

²⁰ *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986). See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

(3) Claimant's permanent partial disability is 34 percent to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award Nunc Pro Tunc of Special Administrative Law Judge Seth G. Valerius dated August 2, 2010, is modified to find claimant entitled to a permanent partial disability award based upon a 34 percent functional impairment but is otherwise affirmed.

Claimant is entitled to 55.61 weeks of temporary total disability compensation at the rate of \$292.31 per week or \$16,255.36, followed by 127.29 weeks of permanent partial disability compensation at the rate of \$292.31 per week or \$37,208.14, for a 34 percent functional disability, making a total award of \$53,463.50.

As of October 29, 2010, there would be due and owing to the claimant 55.61 weeks of temporary total disability compensation at the rate of \$292.31 per week in the sum of \$16,255.36 plus 83.68 weeks of permanent partial disability compensation at the rate of \$292.31 per week in the sum of \$24,460.50 for a total due and owing of \$40,715.86, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$12,747.64 shall be paid at the rate of \$292.31 per week for 43.61 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of October, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Seth G. Valerius, Special Administrative Law Judge
Marcia L. Yates Roberts, Administrative Law Judge